No. 15,854

In the

United States Court of Appeals

For the Ninth Circuit

HAL GILFILEN,
Appellant,

vs.

CITY OF SEWARD, a Municipal Corporation,
Appellee.

Brief of Appellee

Appeal from the District Court for the
District of Alaska, Third Division

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PRELIMINARY STATEMENT

This is a case in which plaintiff seeks to impose upon defendant the burden of removing ice and snow from the sidewalks of Seward, Alaska. This imposition is contrary to both common sense and the law.

No Alaskan statute or judicial decision imposes such a burden. And the District Court in this action determined that defendant had no such burden. We will show the Court that this determination was correct.

FACTS

Plaintiff was injured when he slipped and fell on an accumulation of ice and snow on a sidewalk in Seward,

Alaska.[1] Plaintiff was then walking between two businesses which he owned.[2] It was approximately 8:00 o'clock in the evening and the temperature was freezing.[3] The fall occurred on a portion of the sidewalk adjacent to a vacant lot.[4]

Plaintiff filed this action, claiming that defendant was liable for the ice and snow.[5] Plaintiff alleged that snow and ice had accumulated and was unsafe.[6] Plaintiff's deposition was taken and he testified to the condition of the ice and snow.[7]

On the pleadings and plaintiff's depositions, defendant moved for summary judgment.[8] The question of law was briefed and argued. The District Court determined that there was no genuine issue as to any material fact and that, as a matter of law, defendant owed plaintiff no duty to keep the sidewalk free of ice and snow.[9] Judgment was entered for defendant.[10]

We will show the Court that this judgment was correct: As a matter of law, defendant owed plaintiff no duty to remove the accumulation of ice and snow on which plaintiff slipped.

AS A MATTER OF LAW DEFENDANT OWED PLAINTIFF NO DUTY TO REMOVE THE ACCUMULATION OF ICE AND SNOW ON WHICH PLAINTIFF SLIPPED.

Defendant owed plaintiff no duty because: (1) the accumulation of ice and snow was the product of weather con-

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1. TR. p. 4.
2. TR. pp. 10-11.
3. TR. pp. 4, 11, 14.
4. TR. pp. 10-11.
5. TR. p. 4.
6. TR. p. 4.
7. TR pp. 14, 15.
8. TR. p. 44.
9. TR. pp. 48-49.
10. TR. pp. 49-50.

ditions and pedestrian use of the sidewalk, and (2) a city is under no duty to remove snow and ice so accumulated.

(1) The accumulation of ice and snow was the product of weather conditions and pedestrian use of the sidewalk.

The record shows that the accumulation was the product of snowfall, freezes, thaws, and the trampling of the ice and snow by pedestrians.

Plaintiff alleged that "snow and ice had accumulated" and that the accumulation was "in an irregular shape; was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing".[11] In his deposition, plaintiff similarly testified to the nature of the ice and snow.[12]

It is important to note that neither the complaint nor the deposition charged any *defect* in the sidewalk contributing to the accumulation. Nor was there any charge that the city, or any other persons, had placed the ice and snow on the sidewalk.

Plaintiff slipped adjacent to a vacant lot.[13] The accumulation could not, therefore, have been caused by any defect such as overhanging eaves or leaking drains.

The accumulation could only have resulted from weather conditions and pedestrians' use of the sidewalk. The record compels this conclusion.

Plaintiff's testimony shows that the snow and ice had accumulated because snow had fallen "all winter long" and "the sidewalk had not been cleaned all season".[14]

Plaintiff added that the slickness of the pack was caused by the warming of the weather.[15] This conclusion was sup-

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11. TR. p. 4.
12. TR. pp. 14, 15.
13. TR. pp. 10-11.
14. TR. p. 14.
15. TR. p. 15.

ported by climatological data which defendant submitted to the District Court.[16] This data showed that the temperature during the period preceding plaintiff's accident varied a few degrees above and below freezing. This produced an alternate thawing and freezing.

Plaintiff indicated that other pedestrians had used the sidewalk.[17] Trampling of the snow pack by pedestrians, together with alternate thawing and freezing, produced the uneven accumulation of ice and snow to which plaintiff testified; *Strappelli v. City of Chicago,* 20 NE 2d 43, 44 (Ill 1939).

(2) A city is under no duty to remove snow and ice accumulated by weather conditions and pedestrian use of the sidewalk.

There is no statute in Alaska which imposes upon cities the burden of removing ice and snow from sidewalks. Nor has any Alaskan judicial decision imposed such a burden.

The jurisdictions of the United States uniformly recognize that, in absence of some defect in the sidewalk, cities are not required to remedy conditions resulting from the fall of snow and its subsequent thaws and freezes; e.g., *Casper v. City of Chicago,* 50 NE 2d 858 (Ill. 1943); *Johnson v. Town of Orange,* 69 NE 2d 587 (Mass 1946); *Steele v. City of Chippewa Falls,* 258 NW 181 (Wisc 1935).

The reason for this rule of law is obvious. It would be an impossible burden for cities with heavy snowfalls to keep their miles of sidewalks free of ice and snow. As stated in *McCave v. City of Canton,* 42 NE 2d 762 (Ohio 1942) at p. 764:

> "The reason for the rule above stated is that a municipality should not be required by law to remove from

16. Such data is a proper subject of judicial notice; *McAffee v. United States,* 111 F.2d 199 (CADC 1940); 20 Am. Jur. *Evidence* Section 71.

17. TR. pp. 14, 15-16.

the miles of sidewalks within its limits the natural accumulation of ice and snow, because such a requirement is impractical from the nature of things, and when these conditions exist they are generally obvious so that travelers know of them and assume the risk."

Plaintiff concedes that cities are not liable for accumulations brought about by weather conditions.[18] But plaintiff contends that cities should be liable if this ice and snow is trampled by pedestrians.

This contention was rejected by the District Court. The Court determined that Alaskan cities should not be obligated to clear their sidewalks simply because pedestrians have contributed to an uneven packing of the ice and snow.

This determination is supported by many decisions. The following cases hold *as a matter of law* that cities are not obligated to remove ice and snow which has been packed into uneven shape by pedestrians:

Strappelli v. City of Chicago, 20 NE 2d 43 (Ill. 1939);
Trumbly v. City of Chicago, 80 NE 2d 453 (Ill. 1948);
Stieb v. City of Chicago, 104 NE 2d 112 (Ill. 1952);
Steele v. City of Chippewa Falls, 258 NW 181 (Wisc. 1935);
Thomas v. City of Appleton, 40 NW 2d 575 (Wisc. 1949);
Hyer v. City of Janesville, 77 NW 729 (Wisc. 1898);
Hatch v. City of Elmira, 126 NYS 863 (1911);
Dapper v. City of Milwaukee, 82 NW 725 (Wisc. 1900);
Reedy v. St. Louis Brewing Assn., 61 SW 859, 862 (Mo. 1901);
Vonkey v. City of St. Louis, 117 SW 733 (Mo. 1909);

18. App. Br. p. 38, ll. 4-8.

Wilson v. City of Idaho Falls, 105 P. 1057 (Idaho 1909);

Johnson v. City of Evansville, 180 NE 600 (Ind. 1932);

Berger v. Salt Lake City, 191 P. 233 (Utah 1920).

Casper v. City of Chicago, 50 NE 2d 858, 859 (Ill. 1943):

> "The law is that where the accumulation of ice and snow is from natural causes, although by usage it is uneven and in hillocks, the city is not liable."

The District Court's determination of the law for Alaska is also supported by the reason of practicality. This is ably expressed in *Berger v. Salt Lake City,* 191 P. 233 (Utah 1920) at pp. 237-240. A similar statement is found in *Strappelli v. City of Chicago,* 20 NE 2d 43 (Ill. 1939) at p. 44:

> "Snow when trampled upon by many pedestrians and when subjected to alternate thawing into slush and freezing forms itself, when frozen hard, into irregular mounds which become slippery and difficult at times to walk upon. This condition is general during wintertime throughout Illinois. * * * this prevalent condition produces the reason of necessity which underlies the rule exempting cities in this latitude from liability for injuries on city streets and sidewalks, when the presence of snow and ice is the result of natural causes."

The reasoning expressed in the *Berger* and *Strappelli* cases is particularly applicable to Alaskan cities.

Plaintiff has cited cases which reached a contrary result.[19] Those cases which are based upon *statutes* imposing a duty upon the city are not in point. Alaska, with its heavy snowfall, has no such statute. The balance of plaintiff's cases are based upon incorrect reasoning and should not apply to Alaska.

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19. App. Br. pp. 38-39.

There is no reason to distinguish between accumulations resulting solely from weather, for which a city is admittedly *not* liable, and those resulting from weather and pedestrians. The *reason* for no liability exists in both situations: the impracticality of forcing a city to keep its miles of sidewalks free from snow, which in the case of Alaska might fall continuously for days. The fallacy of the asserted distinction is evident from the fact that sidewalks are *for the use* of pedestrians, and all ice and snow on sidewalks is certain to be trampled by pedestrians in a short period of time. To state that a city is *not* liable for weather accumulation on sidewalks, but *is* liable when pedestrians *use* those sidewalks is an absurdity. Further, there is no difference in the danger to pedestrians; the danger of falling on smooth ice and snow is as great as that of falling on ice and snow which has been trampled and packed.

Putting upon defendant, and the other cities of Alaska, the burden of cleaning their sidewalks of snow and ice involves considerations of climate and municipal finance which are properly for the legislature. The legislature has not seen fit to impose such a burden. And the District Court declined to substitute its judgment for the legislature's. The decision was correct.

PLAINTIFF'S CONTENTIONS

Defendant will now consider plaintiff's arguments and will show the Court that they are insufficient to compel reversal.

Plaintiff's first point is that the District Court should not have granted summary judgment if there was a genuine issue as to any material fact.[20] Plaintiff is correct. However,

20. App. Br. pp. 16-34.

there is no such factual issue in this case. It is clear from the pleadings, depositions, and briefs that the ice and snow was the result of weather plus pedestrians use. The only question was one of *law*: whether or not defendant had a duty to remove such ice and snow. The District Court correctly determined that, as a matter of law, defendant had no such duty.

Plaintiff states that whether or not an accumulation is "natural" is a question of fact.[21] This is true when there is a question as to (1) whether there was in fact an accumulation, and (2) how it was formed. But there are no such questions in this case. The accumulation of ice and snow existed, and was caused by weather and pedestrians.

Nor does plaintiff's recitation of issues[22] raise any questions of fact. Even adopting all inferences favorable to plaintiff, defendant was as a matter of law under no duty to remove the ice and snow.

Plaintiff says that defendant could shift the burden of removing snow and ice to the adjacent landowners.[23] But this is not true. An ordinance requiring the landowners to clear their sidewalks would not relieve the city of any liability imposed upon it.[24] And if the courts were to impose liability upon the city such an ordinance would not relieve the city of the burden of inspecting and clearing the sidewalks, and maintaining crews and equipment to do the work. The *reason* for the rule of non-liability would still be present.

In spite of plaintiff's contentions, two points remain: (1) the ice and snow was the result of weather and pedestrian

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21. App. Br. p. 38.
22. App. Br. pp. 36-37.
23. App. Br. p. 35.
24. A.C.L.A. Sect. 16-1-90 would allow the city only to charge the landowners for removal.

use, and (2) defendant was under no duty to remove such ice and snow. The decision by the District Court as to the law applicable to Alaska is supported by the law and reason. That decision should be affirmed.

PLAINTIFF ASSUMED THE RISK AND WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

Even if defendant were under a duty to remove the accumulation, the judgment of the District Court should be affirmed. Plaintiff as a matter of law assumed the risk and was contributorily negligent.

Plaintiff testified that the accumulation had been there all winter and that he knew of it.[25] He was well acquainted with the condition of the accumulation, having crossed it every day.[26] The condition of the ice and snow was plainly visible to plaintiff.[27] Plaintiff said he knew of at least one person who had fallen there before his accident.[28]

It has been held that when a person knows of the icy condition of a sidewalk, and chooses to cross it anyway, he *as a matter of law* assumed the risk and is contributorily negligent.

Mills v. City of Springfield, 142 NE 2d 859 (Ohio 1956);

Ritgers v. City of Gillespie, 113 NE 2d 215 (Ill. 1953);

Cronin v. Brownlie, 109 NE 2d 352 (Ill. 1952);

Smith v. City of Cuyahoga Falls, 53 NE 2d 670 (Ohio 1943);

City of Norwalk v. Tuttle, 76 NE 617 (Ohio 1906).

Plaintiff argues that an issue of fact is presented because the other alternative routes may also have been dangerous.

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25. TR. p. 14.
26. TR. p. 14.
27. TR. p. 15.
28. TR. p. 16.

But plaintiff assumed the risk and was contributorily negligent *even if* there were no safer routes; *Mills v. City of Springfield,* 142 NE 2d 859, 867 (Ohio 1956).

CONCLUSION

The accumulation of ice and snow was not caused by any defect in the sidewalk or by any act of defendant. It was the product of weather and pedestrian use. The District Court determined that, in the absence of a statute, Alaskan cities had no duty to remove such ice and snow. This determination is supported by case authorities, reason and common sense. Such a duty is for the legislature to impose.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated at San Francisco, California
August 28, 1958.

Respectfully submitted,

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